United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1012

To be argued by
AUDREY STRAUSS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1012

BP/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

GRACE SIMMONS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

AUDREY STRAUSS,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1012

UNITED STATES OF AMERICA,

Appellee,

—v.—

GRACE SIMMONS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Grace Simmons appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 13, 1976 following a four day trial before the Honorable Edmund L. Palmieri, and a jury.

Indictment 75 Cr. 504, a four-count indictment filed on May 27, 1975, charged Grace Simmons, Salena Hicks and Benny Johnson, in Count One with having conspired to distribute heroin in violation of Title 21, United States Code, Section 846. Count Two charged each defendant with distribution and possession of 20 grams of heroin with intent to distribute on October 1, 1973, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Count Three charged each defendant with the same violation resulting from the distribu-

tion of 21 grams of heroin on December 5, 1973. Count Four charged each defendant with the same violation based on a distribution of 36 grams of heroin on January 17, 1974.

On September 16, 1976, the Government consented to sever the case against Salena Hicks because of psychiatric reports stating that she was mentally incompetent to stand trial and was unlikely to recover. On February 7, 1977, an order of *nolle prosequi* was filed as to the charges against her in this indictment.

On September 29, 1976, Benny Johnson entered a guilty plea to Count Three of the indictment. On November 18, 1976, Judge Owen sentenced Johnson to one year of imprisonment to be followed by three years' special parole.*

On October 18, 1976, the trial of Grace Simmons commenced. It concluded on October 21, 1976, when the jury found her guilty on all four counts.

On December 13, 1976, Judge Palmieri sentenced Simmons to eight years of imprisonment on each of Counts One, Two and Three, to be followed by five years' special parole. On Count Four he imposed a five year term of imprisonment, with execution suspended and the defendant placed on probation for that period of time. This period of probation is to run consecutive to the sentences

---

* On March 3, 1975, Benny Johnson pleaded guilty to Count One of Indictment 74 Cr. 727 charging him (and others not involved in this case) with distribution of cocaine. On November 18, 1976, Judge Owen sentenced him for that offense to five years' probation. The sentencing upon the present indictment was also undertaken by Judge Owen at that time.

on Counts One, Two and Three. A committed fine of $2,000 was also imposed on each of the four counts.*

Simmons was remanded after the jury's verdict and is currently serving her sentence.

Statement of Facts

A. The Government's Case

1. The general conspiratorial agreement

During 1972, 1973 and 1974, Grace Simmons ran a brisk heroin business that drew customers from the patrons of Singleton's Bar, 2268 Eighth Avenue, New York, New York. At Singleton's, the bartender, Benny Johnson, would take heroin orders from customers and arrange for the deliveries. Salena Hicks, who worked as a runner for Simmons, would usually execute the deliveries, sometimes with the help of Willie Brown. The trade at Singleton's involved one-half to two ounce sales of heroin occurring as frequently as three times a week during this period. (Tr. 34-37, 81-84).**

To run this heroin business with a minimum of risk, Simmons utilized a mode of operation that usually kept

---

* The sentencing on December 13, 1976 was held to correct the sentence imposed on December 2, 1976, when the Court imposed a period of probation on Count Four to run consecutive to the sentences on the other counts with special parole on each count following the term of probation. This created a hiatus between the prison terms and the terms of special parole and the later sentencing was undertaken to correct this problem.

** "Tr." refers to the trial transcript; "Tr." followed by a date refers to the transcript of a pretrial conference on the designated date; "Br." refers to appellant's brief; and "App." refers to appellant's appendix.

her and her runners well protected. When approached by a customer interested in buying some heroin, the bartender, Benny Johnson, would call Salena Hicks. (Tr. 37). If Salena Hicks could not be reached, Johnson would call Grace Simmons directly. (Tr. 39-40). Through either Hicks or Simmons arrangements were made to have the heroin delivered to a location other than Singleton's. (Tr. 38-39). The most common spots chosen for this purpose were the Gold Star and Sterling Bars located adjacent to each other at 94th Street and Third Avenue. (Tr. 39). Following Johnson's call, Hicks would go to one of these bars with the heroin. Willie Brown would frequently serve as a second intermediary, taking the heroin from Hicks to the customer at Singleton's. (Tr. 43, 82-84).

To further safeguard against detection, code language was used. Thus, in ordering an ounce of heroin from Hicks or Simmons, Johnson would ask for "twelve shoes," thereby communicating the fact that his customer wanted one ounce for $1200. (Tr. 38). For arranging a one ounce sale, Johnson received $200. (Tr. 36). Brown would get $100 for his role in consummating the deal. (Tr. 34).

2. October 17, 1973—Grace Simmons delivers the heroin

In May, 1973 Willie Brown was arrested for a narcotics transaction unrelated to his role as a runner for Grace Simmons.* Following his arrest, Brown agreed to cooperate with the Drug Enforcement Administration ("DEA") and to lead them to his drug connections. This

---

* Brown was convicted in that case in 1973.

resulted in the exposure of Simmons' heroin outlet at Singleton's Bar. (Tr. 80).

In the first step of the investigation, Brown acted alone in making a purchase of one ounce of heroin. Brown began by placing an order with Benny Johnson for one ounce of heroin, telling Johnson that he was buying the heroin for a friend. On October 17, 1973, Brown went to Singleton's to make the purchase while surveillance agents watched his movements and listened to his conversations through a Kel monitoring device. Upon Brown's arrival at Singleton's, Benny Johnson made his usual telephone call and told Brown to meet "Grace" at the Gold Star Bar. (Tr. 44, 83). Brown gave Johnson $1200 previously supplied to him by DEA. (Tr. 44, 87).

Brown then drove in his own car to the Gold Star Bar, met Simmons in the bar, and then left with her shortly thereafter. Following Simmons' instructions, Brown drove with her to the vicinity of Eighth Avenue and 111th Street. During the ride the Kel transmitter relayed their conversation concerning the deteriorating conditions at a bar they both frequented.* When Brown reached Eighth Avenue and 111th Street, Simmons instructed him to park in front of Caesar's Bar and to wait until she returned. (Tr. 88-89).

After getting out of Brown's car, Simmons hailed a cab. Surveillance agents followed the cab which took a zig-zagging route while Simmons peered through the back window at the agents who were tailing her. The cab

---

* After Simmons testified in her own behalf that she had never been to Singleton's Bar, the Government established in its rebuttal case that this taped conversation was all about Singleton's Bar.

discharged Simmons in the vicinity of 106th Street and Third Avenue,* where the agents lost sight of her. (Tr. 177-78).

About twenty minutes to an hour after she had left Brown at Caesar's Bar, Simmons reappeared. She had a young child with her. Leaning through the window of Brown's car, Simmons dropped a one-ounce bag of heroin onto the seat of the car. Before leaving she warned Brown that the police were on to them and that he should not return to Singleton's Bar that night. (Tr. 90, 204-5).

Later that evening, Grace Simmons went to Singleton's Bar. There, Benny Johnson gave her the money he had received from Brown for the heroin. (Tr. 44).

3. December 5, 1974—Willie Brown introduces the undercover agent

Attempting to advance the investigation, on December 5, 1973, Brown introduced Benny Johnson to the purported customer of the earlier sale. This, of course, was a DEA agent, Carliese Gordon, acting in an undercover capacity. Gordon drove to Singleton's with Brown, who introduced Gordon to Benny Johnson. Brown then asked Johnson to get an ounce of heroin for Gordon. Johnson proceeded to execute the order by making a telephone call. Following the call, Johnson instructed Brown to go to the Gold Star Bar for the pick-up. Gordon gave Johnson $1200 in official funds, which Johnson in turn placed in a sealed envelope and handed to Brown. (Tr. 45-46, 92-95, 155-56).

---

* The Government subsequently proved, and Simmons admitted, that she maintained an apartment at 225 East 106th Street, which is at the corner of Third Avenue.

Gordon and Brown then drove to the Gold Star Bar where Brown saw the usual runner, Salena Hicks, waiting at the bar. However, upon attempting to approach her, Brown was rebuffed. Hicks angrily told him, "Don't you talk to me," and she thereupon left the bar. (Tr. 95, 156-57).

Gordon and Brown remained at the bar. Before long the barmaid announced a telephone call for Willie Brown. Brown took the phone and found Grace Simmons at the other end. Simmons proceeded to reprimand Brown for bringing the customer along for the pick-up, telling him that he should know better. Simmons then instructed Brown to meet Hicks at the Sterling Bar, which was next door to the Gold Star, and to tell her that Grace said that it was all right. (Tr. 95-96, 157).

Leaving Gordon behind at the Gold Star, Brown went to the Sterling Bar where he joined Hicks at the bar. Hicks gave him a one-ounce package of heroin; Brown gave her the sealed envelope containing the money. Brown thereafter returned to the Gold Star where he gave Gordon the package of narcotics. (Tr. 96-97).

Later that evening Salena Hicks stopped by Singleton's and upbraided Benny Johnson for sending Brown with a stranger for the pick-up. A while later, Benny Johnson received a call from Grace Simmons, who bawled him out for the same thing. She told him that Brown should know better than to arrive for a pick-up in the company of a stranger. (Tr. 46).

4. January 17, 1974—Agent Gordon purchases narcotics from Johnson and Hicks

Despite Simmons' continued wariness, on January 17, 1974, Benny Johnson was willing to deal directly with

Agent Gordon in making a sale. Johnson accepted an order from Gordon for two ounces of heroin. Johnson made his usual telephone call and, following the instructions he received, proceeded with Gordon to the Hamilton Lounge at 141st Street and Amsterdam Avenue. Salena Hicks arrived but was unwilling to deal hand-to-hand with Gordon. Accordingly, she left the heroin in an ashtray from which Gordon retrieved it. Gordon paid $2900 to Johnson, who kept $300 for himself and gave the rest to Hicks. Hicks left the Hamilton Lounge with Agent Gordon, who offered her a ride to her destination. Hicks declined and took a cab instead. (Tr. 46-49, 159-61).

Surveillance agents followed Hicks' cab to the vicinity of Third Avenue and 106th Street. After she left the cab, the agents followed her into an apartment house at 225 East 106th Street. Taking the same elevator as she did, an agent observed her get off at the sixteenth floor and ring the bell for Apartment 16A. (Tr. 207, 215-16). After her arrest in this case, Simmons gave her home address as 225 East 106th Street, Apartment 16A. (Tr. 225).

B. The Defense Case

Grace Simmons took the stand in her own behalf. She told the jury that she was a housewife with four children. She married Al Morris in 1972 and worked part-time at a dry cleaners that he owned until the business collapsed. (Tr. 238-242).

Simmons explained her relationship to each co-conspirator, saying that she knew Salena Hicks only as a barmaid with whom she bet on the numbers; she knew Benny Johnson as a bartender; and she had met Willie Brown at a bar several times. (Tr. 242-43).

Denying any involvement in a narcotics sale of October 18, 1973, Simmons gave an exculpatory version of her meeting with Brown that night. She claimed that she went to the Gold Star Bar that evening to play the numbers while waiting until it was time to pick up her daughter at a hairdresser shop. She left the bar, after announcing aloud that she was going crosstown to meet her daughter. Brown then approached her and offered her a ride since he was going that way and then returning. (Tr. 244).

During the car ride they discussed the weather and how dangerous it was at a certain bar. (Tr. 244). Brown dropped Simmons off near the beauty parlor and Simmons said he would be right back. At the beauty parlor Simmons discovered that her daughter was not ready to leave. She therefore waited for her daughter for fifteen or twenty minutes and then she returned with her daughter to Brown's car. However, rather than accept the ride back, Simmons told Brown that she intended to take a cab home, which she proceeded to do. (Tr. 245).

Contradicting the testimony of two surveillance agents, Simmons denied that she had taken a cab to the vicinity of her apartment between the time that Brown dropped her off and the time that she returned with her daughter to Brown's car. (Tr. 246-47). Challenging the testimony of another surveillance agent, Simmons claimed that Hicks had never been to her home. (Tr. 249). Contesting the testimony of Brown and Johnson, Simmons denied that she ever trafficked in narcotics at any time in her entire life. (Tr. 248).

On cross-examination Simmons testified that she personally had no source of income since 1972 or 1973, when

she stopped receiving welfare payments.* Her only source of support for both herself and her children was, she said, the income of her husband, Al Morris, who earned money from his dry cleaning business and from gambling. (Tr. 249-50). She estimated that income as $18,000 a year in 1972 and 1973, falling to $9,000 a year in 1974 when the dry cleaning business collapsed. (Tr. 253-55). Simmons admitted that during this period her husband maintained her and her children in an apartment at 106th Street, kept a separate apartment for himself on 91st and yet managed in 1974 to buy for them a $34,000 house in Long Island. After purchasing the house they installed a full-size swimming pool. They also owned late model cars during this time. (Tr. 255-61).

In testifying about her financial situation Simmons claimed that she and her family moved to the house on Long Island in late 1973 and sublet the apartment on 106th Street at that time. (Tr. 262). When confronted with the fact that she gave the apartment at 106th Street as her home address upon her arrest in May, 1975, Simmons claimed that the 106th Street address was already listed on arrest warrant when she was arrested. A copy of the arrest warrant, which had no address on it, did not convince her to the contrary. (Tr. 263-65, 270; GX 7). Simmons also asserted that when conducting the pre-arraignment interview, which took place in the presence of her attorney, Assistant United States Attorney Harry C. Batchelder, Jr. did not ask her address because he already had her address as 225 East 106th Street. Therefore, she did not bother volunteering the fact that she

---

* At sentencing, Simmons did not deny the allegations contained in the pre-sentence report that she was receiving welfare payments under different names in both New York and Nassau County through 1976.

had sublet that apartment and that she was living at another address. (Tr. 269).

When probed about her prior acquaintance with Willie Brown, Simmons testified that she met him at a party at the Hootai Bar in the summer of 1973. They were not introduced; they did not converse; and they did not see each other again until October 18, 1973. (Tr. 276-79).

On October 18, 1973, Simmons saw Brown at the Gold Star Bar. Although they had only met once before and although they had no conversation that night at the Gold Star, Brown offered her a ride after he overheard her say that she was going to pick up her daughter at the beauty parlor. (Tr. 283-84). Contradicting her direct testimony, Simmons now attested that Brown had no other stops to make and was coming directly back to the Gold Star Bar. (Tr. 287, 289). Once uptown, Simmons kept Brown waiting in his car for twenty minutes while she waited for her daughter at the beauty parlor. Finally, she returned to Brown's car and announced her intention to take a cab crosstown even though she knew Brown was going her way and would pass by the very corner she lived on. (Tr. 292-94). To explain this bizaare turn of events, Simmons said that she did not want her daughter to "know what friends I see," even though in her testimony she had denied that Brown was a friend and even though in accepting the favor from Brown at the outset she knew that she was going to pick up her daughter.

When asked whether Benny Johnson or Willie Brown had a grudge against her that would motivate them to falsely accuse her, Simmons conceded that to her knowledge neither had reason to try to harm her. (Tr. 271-72, 304-05).

In minimizing her relationship with Benny Johnson, Simmons attested that she had never been in Singleton's

Bar, a claim which she emphatically reaffirmed later in her cross-examination. (Tr. 271, 295).

Finally, Simmons denied that she had discussed the delivery of narcotics, using the code word "shoes," in telephone conversations on April 9 and 25, 1974, with one Artie Westbrook. (Tr. 308).

C. The Government's Rebuttal Case

In rebuttal the Government established that Simmons had lied when she denied ever going to Singleton's Bar, when she claimed that Assistant United States Attorney Batchelder told her rather than asked for her address, and when she denied discussing the delivery of "shoes" with Artie Westbrook.

The Government recalled Benny Johnson and Willie Brown to demonstrate, with use of the tape recording of the defendant's conversation with Brown on the night of October 18, 1973, that contrary to Simmons' testimony, she was intimately familiar with Singleton's Bar. Johnson, who had tended bar there, testified that Simmons had been to Singleton's about ten or fifteen times. (Tr. 340). Johnson then explained references made by Simmons on the tape to Singleton's Bar. As Johnson explained, Simmons' comment that Michael was "riding a death train" referred to a boy named Michael who was a regular at Singleton's and was known as a trouble maker. In the tape recording, Simmons also said that Johnson's girlfriend, Sandy, "watched his back," referring to the fact that she sat at the bar every day watching for people trying to steal whiskey when Johnson turned his back. (Tr. 341-44).

Brown similarly testified that he was at Singleton's five days a week and that Simmons would come by once

or twice a week. (Tr. 368). He reaffirmed his direct testimony in which he had stated that the taped conversation with Simmons on the night of October 18, 1973 was about Singleton's Bar. (Tr. 368). Explaining particular phrases as the tape was played, Brown explained to the jury that he and Simmons were discussing rough gangs of young people who had made the bar unpleasant. He also explained their references to Michael and to Benny Johnson's girlfriend, Sandy. (Tr. 368-73).

Assistant United States Attorney Harry Batchelder testified that, contrary to Simmons' testimony, he obtained her address during the pre-arraignment interview by asking her what her address was. She gave her address as 225 East 106th Street, Apartment 16A. He had no basis for knowing her address before she gave it and she never said that she has a different address. (Tr. 334).

Finally, the Government offered tape recorded conversations derived from a state wiretap in which Simmons discussed narcotics with an undercover agent. Using the code word "shoes" to refer to heroin—just as Johnson said he used the code word "shoes" in his discussions with Simmons—the defendant and the undercover agent, Artie Westbrook, discussed deliveries of drugs in two taped conversations which occurred on April 9 and 25, 1974. Of course, Simmons had denied any drug dealings and she had specifically denied that these two taped conversations took place.*

---

* Simmons was unable to claim surprise when the Government offered this evidence. In connection with the state case, the defendant and her counsel were given transcripts of these conversations months before the federal trial. (Tr. 61).

ARGUMENT

POINT I

The District Court Properly Denied Simmons' Motion to Dismiss the Indictment on Grounds of Pre-Indictment Delay.

Simmons' first two points on appeal are based on her claim that the indictment should have been dismissed because she purportedly suffered prejudice during the sixteen month period that elapsed between the offense and the filing of an indictment against her. Her claim of prejudice arises from the fact that her co-defendant, Salena Hicks, became mentally incompetent between the time of the offense and the filing of the indictment and, it is argued, absent any delay Hicks would have offered testimony exculpatory of Simmons at their joint trial. This is, we submit, a patently frivolous claim that does not began to amount to the Fifth Amendment violation asserted by Simmons.

A. Factual Background

The indictment in this case was filed on May 27, 1975, alleging a narcotics conspiracy and narcotics sales beginning October 1, 1973, with the last overt act and sale on January 17, 1974. The defendants were arraigned on June 17, 1975 and entered pleas of not guilty. The case was assigned to Judge Metzner.

On September 25, 1975, at a pretrial conference Hicks moved for dismissal of the indictment on the grounds of prejudicial pre-indictment delay. John Curley, Hicks' attorney, argued that the passage of sixteen months between the offense and the indictment caused prejudice

to Hicks because during that time she had become mentally incompetent. Mr. Curley told Judge Metzner that:

> "I have been unable to confer with her [Hicks] concerning the facts of this case both because of her incarceration in—not incarceration, but her confinement in either Bellevue or Kirby Manhattan State Hospital and the fact that she apparently says she had no recall concerning the facts of this case. . . ." (Tr. 9/25/76 at 6).*

Attempting to jump on the bandwagon, Simmons' attorney, Nathan Mitchell, sought permission to join in Hicks' motion for dismissal, claiming that Simmons was prejudiced by the pre-indictment delay because "I submit that she is intertwined, so to speak, her actions with Grace Simmons, and her testimony would certainly be exculpatory with respect to Grace Simmons." (Tr. 9/25/75 at 25). Judge Metzner responded by telling Mr. Mitchell that: "Prejudice is individual and personal and you are going to have to have an affidavit as to how you have been prejudiced." (Tr. 9/25/75 at 26). The court granted permission for such an affidavit to be filed.

On the following day Mr. Mitchell submitted his own affidavit sworn to September 26, 1975. In the only passage explaining the basis for the claim that Hicks would offer exculpatory testimony at a joint trial, Mr. Mitchell recited the following:

---

* In an affidavit in support of the motion to dismiss, sworn to September 24, 1975, ¶¶ 7, 8, Mr. Curley attested as follows:

> "I am informed and believe that my client has little or no recollecion of the names, dates and places in the indictment, the state indictment or any distinction between them.
>
> "I am unable to adequately confer with my client and prepare her case for trial."

> "Grace Simmons has advised deponent upon the trial of this indictment that she will give testimony on behalf of herself refuting the allegations of the Government agents and informant, and further, that Salena Hicks also intends to testify and corroborate said Grace Simmons' testimony refuting the Government's allegation, as such Salena Hicks is a material and necessary witness on behalf of Grace Simmons as well as herself."

In responding to Mr. Mitchell's motion to dismiss, the Government contested the sufficiency of this showing, noting that it came only in the form of an attorney's affidavit and failed to specify the exculpatory testimony that Hicks would give. In an affidavit sworn to October 16, 1975, Mr. Mitchell attempted to improve his showing. That affidavit attested as follows:

> "I am advised by Grace Simmons that Salena Hicks as a witness for Grace Simmons will testify that no transactions involving the possession or distribution of narcotic drugs ever occurred between Salena Hicks and Grace Simmons nor did Salena Hicks at any time go to the residence of Grace Simmons, more specifically 225 East 106th Street, New York, New York, Apartment 16A.
>
> Further, the said Salena Hicks will testify that she did not deliver packages containing narcotic drugs on the 5th and 17th of January, 1974, as alleged in the overt acts in the indictment; that prior to the dates of the alleged crimes in the indictment she worked as a barmaid at Singleton's Bar on Eighth Avenue, in New York County at which time Benny Johnson who was the bartender of the said bar had told here he was "in trouble with the Feds and was going to get them somebody by hook or crook." (App. 12).

After receiving a report that Hicks was incompetent to stand trial, Judge Metzner filed an opinion denying the motions to dismiss the indictment but holding the entire case in abeyance until June 1976, at which time the Government was required to have Hicks reexamined. This adjournment of Simmons' trial was consistent with Mr. Mitchell's request that trial of his client not be held in the event that Hicks' case was adjourned for purpose of further mental examinations. (Tr. 10/14/75 at 6).

On September 10, 1975, Judge Metzner received a report of the second psychiatric examination of Hicks. Again Hicks was found incompetent to stand trial. Moreover, the report predicted that she would never regain competency. On September 16, 1976, the Government announced that in light of this report it would seek an order of *nolle prosequi* as to Hicks, but that it wished to proceed against the other defendants. Simmons' renewed motion to dismiss the indictment on the grounds of Hicks' unavailability was denied on October 12, 1976.

B. Simmons Failed To Show Prejudicial Pre-Indictment Delay

As this Circuit recently noted, in evaluating preindictment delay, the primary guardian of the individual's rights is the statute of limitations." *United States* v. *Vispi*, 545 F.2d 328, 331 (2d Cir. 1976). Under *United States* v. *Marion*, 404 U.S. 307, 324 (1971), to establish pre-indictment delay amounting to a violation of due process as guaranteed by the Fifth Amendment, "actual prejudice" and use of the delay by the Government as a tactical device must be demonstrated.* Here, Simmons

---

* In *United States* v. *Vispi, supra*, this Court stated that it has not yet decided whether a showing of either prejudice *or* deliberate tactical delay would suffice. Since neither showing was made in this case, the issue need not be reached here.

failed to show either prejudice or deliberate delay by the Government for purposes of tactical advantage.

At the outset, to place Simmons claim of prejudice in prospective, it should be noted that a sixteen month delay resulting in unavailability of a co-defnedant as a witness is not even as serious as many claims that have been held insufficient to establish a Fifth Amendment violation. See, *e.g. United States* v. *Schwartz*, 464 F.2d 499 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972) (five year delay with claim of destroyed documentary evidence insufficient); *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972) (five year delay and speculative claim of loss of potential defense witnesses insufficient); *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972) (four year delay and claim of dimming memories insufficient); *United States* v. *Parrott*, 425 F.2d 972 (2d Cir. 1970), *cert. denied*, 401 U.S. 979 (1971) (three year delay and death of prospective witnesses insufficient).

Moreover, as insubstantial as this claim of prejudice is on its face, its basis was insufficiently established in the District Court. Simmons' only claim of prejudice stems from Hicks' unavailability as a witness for Simmons. The premise of the claim is that, if competent, Hicks would have testified at a joint trial and exculpated Simmons. In the context of severance cases, this Court has treated with great skepticism such bald assertions that a defendant would waive the Fifth Amendment privilege and testify on behalf of a co-defendant, and accordingly, to gain a severance particularized showings of the co-defendant's willingness to waive the privilege is required. See *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976), and cases there cited. Indeed, in the context of this case, there was a "substantial probability," *United States* v. *Stassi*, 544

F.2d 579, 582 (2d Cir. 1976), that Hicks would not waive her privilege, and thus her unavailability could not have prejudiced Simmons. Here, Simmons came forward only with an attorney's affidavit setting forth her belief that Hicks, if competent, would testify and exculpate her. On this kind of meager showing, even a severance would have been properly denied.*

More importantly, Simmons' showing that Hicks, if competent, would give testimony exculpatory of Simmons was unconvincing, if not totally incredible. Hicks' own attorney attested that he was unable to confer with Hicks about the facts of the case because she had no recollection of the events. Yet according to Mr. Mitchell's affidavit, Simmons told him that Hicks would testify that she did not deliver packages of narcotics on January 5 and 17, 1974, as charged in the indictment, and that she never went to Simmons' apartment as a surveillance agent would testify. This apparent contradiction can be explained in one of only two ways: either Hicks was competent and able to tell Simmons precisely how she would testify about the allegations of the indictment or Simmons did not confer with Hicks about Hicks' ability or willingness to give exculpatory testimony. If Hicks was competent (contrary to the impression she gave to the doctors), she was available to be called as a witness for Simmons. If, on the other hand, Hicks could not recall the events charged in the indictment, Simmons fabricated the claim that Hicks could and would give an exculpatory

---

* It is interesting to note that Simmons never moved for a severance so that Hicks could be called as a witness. The first mention of Simmons' need to call Hicks as a witness came four months after the filing of the indictment, only days before the first scheduled trial date and only after Hicks' counsel moved to dismiss the indictment on grounds of pre-indictment delay.

version of these events.* Thus, far from establishing a credible basis for arguing that the time elapsed between the offense and the filing of the indictment prejudiced her case, Simmons made a sketchy showing of prejudice that does not hold up against the rest of the record in this case.

C. There Was No Intentional Delay For Tactical Purposes

Simmons also argues that the pre-indictment delay was "intentional within the meaning of *Marion*." (Br. 12). This claim was never thought worthy of mention in the District Court and its frivolousness may well explain the failure to raise it below.

In response to Hicks' and Simmons' motions to dismiss for pre-indictment delay, the Government submitted an affidavit explaining the history of this prosecution. (App. 5-10). The heroin sales charged in the indictment occurred from October 1973 through January 1974. After January 1974, arrests of Hicks, Simmons and Johnson were held in abeyance as the investigation continued. Further dealings with Johnson resulted in the development of a separate case against him and his cocaine sources. Arrests were effected in that case on July 14, 1974 and an indictment was filed on July 19, 1974.

---

* The blatant perjury commited by Simmons at this trial demonstrated her ability to lie even against almost certain odds that she would be exposed. Her sworn denial that she had conversations with Artie Westbrook was made with knowledge that tape recordings of those conversations existed. Judge Palmieri noted at sentencing that the defendant "was guilty of very heavy-handed perjury in this case. She made a number of statements that were so palpably false that I don't see how she could possibily have expected anybody, much less the jury, to believe them." (Tr. 561).

United States v. *Davis*, 74 Cr. 727 (RO). Thus, from January 1974 until July 1974, action could not be taken in the Simmons case without jeopardizing the continuing investigation of Johnson's other narcotics activities.

In the meantime, on March 28, 1974, Simmons and Hicks were indicted by New York State for major narcotics violations carrying mandatory sentences of 25 years to life imprisonment.* In view of the fact that Simmons and Hicks might receive such lengthy sentences in their state case, the Goverenment held this federal prosecution in abeyance on the reasonable expectation that it might be entirely superfluous. However, the state case did not proceed quickly and by May 1975 the state prosecution was bogged down in suppression hearings. At that point the federal prosecution was initiated.

Thus, the Government's explanation for the delay between July 1974 and May 1975 was its expectation that state prosecution would result in a sentence of Simmons that would make federal prosecution a gesture without purpose. Far from constituting intentional delay undertaken to gain tactical advantage over the defendant, this was no more than an attempt to use prosecutorial resources judiciously.

In her brief on appeal, Simmons distorts the record on this issue. She claims that the Government's affidavit in opposition to the motion to dismiss for pre-indictment delay "establishes that the decision to move forward with the federal prosecution was made for fear the State prosecution would be lost" and that "a federal indictment was only sought when 'it became apparent' that

---

* Simmons was the subject of a second narcotics indictment on May 1, 1975.

the wiretaps evidence would be suppressed in the State courts." (Br. 12).* In fact, when the Federal Government indicted in May 1975 it could not have done so because "it became apparent" that the wiretap evidence would be suppressed in the State courts. The motion which led to that suppression was not made until June 16, 1975, almost a month after the federal indictment was filed. The decision which granted the motion was not announced until Decembe 5, 1975.** Counsel on this appeal represented Simmons in the state proceedings and, thus, the suggestion in his brief that the federal prosecution was undertaken in anticipation of his successful suppression motion is most amusing in view of his own failure to recognize the existence of his successful motion as of the date of the filing of the federal indictment.***

Equally absurd is the argument that the Government violated its own guidelines by bringing this federal prose-

---

* Defense counsel's misstatement of the Government's affidavit is accomplished by quoting the words "it became apparent" entirely out of context. The actual sentence reads as follows: "During the month of May 1975 it became apparent that the case in New York State would not be resolved during the next few month." (App. 8).

** The history of the state suppression issue is set forth in *People* v. *Simmons*, 84 Misc. 2d 749, 378 N.Y.S. 2d 263 (N.Y. County Sup. Ct. 1975). As Justice Walter Gorman explains in his opinion, from June 2 through June 16, 1975, hearings were held on motions to suppress. On the last day of the hearings, June 16, 1975, counsel raised the only issue which was to succeed, a motion to suppress based on untimely sealing. A hearing on that issue has held on October 20, 1975. On December 5, 1975 the granting of the motion to suppress was announced in open court, followed by an opinion on December 15, 1975.

*** Although concern that the state prosecution had been jeopardized was obviously not a factor in initiating this federal prosecution, in setting the record straight on this point we do not mean to suggest that the presence of such considerations would be improper.

cution involving "substantially the same charges [as] have been aired in State courts." (Br. 13). There was nothing in the record of this case from which appellate counsel could properly argue that the federal and state cases involved substantially the same charges. From the few places in the record where the state case was discussed, it is apparent that the state case involved undercover purcases of narcotics in multikilogram quantities and that the federal and state cases did not overlap. (Tr. 296-97, 551).* If defense counsel, (who tried the state case and presumably reviewed this record for this appeal) is able to specify a single narcotics transaction charged and proved in both the federal and state cases, we would be curious to hear what it is.

Thus, all of the intemperately worded charges that the federal prosecutor unilaterally abrogated Justice Department policy, that the federal case was mere harassment, and that the federal prosecution was motivated by bad faith (Br. 13-15), are utterly baseless. The need to go outside the record and then to misrepresent the true facts in attempting to show intentional tactical delay only exposes the insubstantiality of the underlying claim.

D. Judge Metzner's Denial of the Motion to Dismiss Was Neither Arbitrary Nor Capricious

Finally, Simmons presents Judge Metzner's initial opinion denying the motion to dismiss as though it created some legal right to a dismissal at a later date. The argument is made because Judge Metzner's opinion contained

---

* The federal jury received a glimpse of the state case when it heard wiretapped conversations between Simmons and a State undercover officer, calling himself Artie Westbrook. (GX 12, 13).

language which appeared favorable to the defendant's viewpoint. That language was as follows:

> "While the case presents strong appeal for dismissal because of the peculiar fact situation, I am of the opinion that the mater be held in abeyance for a time. The Government is directed to have defendant Hicks examined by Dr. Portnow during the month of June 1976. The motions are denied without prejudice to renewal after receipt of Dr. Portnow's report after examination."

From this, Simmons contends that Dr. Portnow's later report finding Hicks to still be incompetent required that her renewed motion to dismiss be granted.

Suffice it to say, Judge Metzner's comment that the "case presents strong appeal from dismissal" probably referred to Hicks' case, Hicks having been the primary movant on this issue. However, in any event, the fact that Judge Metzner found the defendant's position "appealing" certainly did not require a dismissal upon renewal of the motion. The subsequent decision to deny the motion to dismiss was entirely proper in view of Simmons' failure to establish pre-indictment delay which amounted, even arguably, to a violation of Fifth Amendment rights.

POINT II

The Prosecutor Did Not Mislead the Jury About the Date of Johnson's Agreement with the Government.

Simmons argues that the prosecutor knowingly encouraged Benny Johnson to give false testimony about his arrangements with the Government. The allegedly false testimony was Johnson's attestation that he did not enter into an agreement with the Government until he entered a guilty plea in this case. Simmons relies on language in an affidavit by Assistant United States Attorney Thomas E. Engel to leap to the conclusion that Benny Johnson had made his deal with the Government a year and a half before that agreement was reached. In fact, defense counsel's presentation to this Court entirely ignores the record in this case, which completely substantiates the accuracy of Johnson's testimony.

The record shows that, just as Johnson testified, from the time of Johnson's guilty plea in his earlier case, until the time of his guilty plea in this case, no arrangement was reached between him and the Government. Assistant United States Attorney Engel believed that there was a tentative agreement that Johnson would plead and cooperate in this case. However, Johnson's attorney had a very different view of the situation.

The rocky history of the Government's negotiations with Benny Johnson in connection with this case began on March 3, 1975, the day Benny Johnson pleaded guilty to Indictment 74 Cr. 727 charging him (and others) with distribution of cocaine. As the record of that plea reflects, Johnson's attorney, Morris Cohen, had been informed that the Government was planning to file this in-

dictment against Johnson and Mr. Cohen had obtained an agreement that the Government would cooperate in efforts to consolidate the two cases for purposes of sentencing. (Tr. 3/3/75 at 27-28).

Mr. Engel thereafter believed that he had reached some agreement with Mr. Cohen that Johnson would plead guilty and cooperate in the subsequent case that was expected to be brought. (Tr. 7/28/75 at 2; Tr. 9/25/75 at 11; Engel Affidavit ¶ 8, App. 8). However, as time went on Mr. Cohen's actions and words clearly evidenced Mr. Cohen's contrary belief. Thus, when Johnson was called to testify in the grand jury in this case, Mr. Cohen refused to allow him to testify in the absence of a grant of immunity, a position utterly inconsistent with an agreement to cooperate and to plead guilty.* At the pre-trial conference on September 25, 1975, Judge Metzner noted that when he tried to get the prosecutor and defense counsel together earlier in the week to iron out their positions, there was no agreement. Judge Metzner observed as follows:

> "Engel has said that Mr. Cohen's client is going to plead guilty. Mr. Cohen says he doesn't know how Engel knows that because he, Cohen, doesn't know it." (Tr. 9/25/75 at 8).

---

* The defendant's brief characterizes Johnson's failure to testify in the grand jury proceeding as part of the Government's agreement with Johnson. (Br. 20). There is simply no basis for that assertion. Mr. Engel's affidavit conveys the absence of an agreement on this point. As Mr. Engel put it, Johnson "was asked to testify" and "Johnson's counsel, Mr. Cohen, said that he would not testify without immunity. . . ." (App. 8-9). It is apparent that far from constituting part of a negotiated agreement, this turn of events surprised the Assistant United States Attorney and that this was the first sign that there had been no meeting of the minds between Mr. Engel and Mr. Cohen.

On September 9, 1976, after Hicks was again found incompetent, the Government announced that it was ready to proceed to trial against both Simmons and Johnson, evidencing its recognition that it had no agreement with Johnson. (Tr. 9/16/76 at 3). Unlike an attorney with a deal in his pocket, Mr. Cohen sought to make motions to dismiss and also agreed to a mutually convenient trial date. (Tr. 9/16/76 at 3-4). Finally, the heart of the problem was revealed as Mr. Cohen recited his view of the history of the case, noting that he needed the plea minutes in the first proceeding to determine what promises had been made to his client.* In response, the Assistant United States Attorney who tried this case explained that there had been a misunderstanding between the Government and defense counsel about the Johnson's agreement in this case. Her statement was as follows:

> "Your Honor, I understand from Mr. Engel that he believed the Government had an arrangement with the defendant Johnson whereby Johnson would enter a guilty plea in this case, cooperate and testify in this case, and that that cooperation would be brought to Judge Owen's attention at the sentencing before Judge Owen. And the sentencing before Judge Owen was adjourned, as I understand it, for that specific purpose.

---

* Mr. Cohen's comments were as follows:

"At that time the sentence was adjourned in contemplation of what action would follow in this proceeding. I had numerous conversations with Mr. Engel, who was a former Assistant U.S. Attorney, and at one time he suggested that my client appear before the grand jury.

I then requested that he receive immunity, which was not granted. And then Miss Strauss came into the picture.

And I also asked Miss Strauss to try to obtain a copy of the plea which was taken before Judge Owen, so that— I don't recall exactly what was said then because of the length of time, but I would like to see a copy of the plea to find out whether or not any promises were made on behalf of the Government or whether any representations were made by myself for my client."

> "Mr. Cohen tells me he has either a vague or a different recollection of those events and we are going to try to find out more specifically, certainly between now and the new trial date, what went on at that time."

Judge Metzner directed that the misunderstanding be resolved within the following week. In fact, the matter was rectified when the parties reviewed the March 3, 1975, plea minutes in which Mr. Cohen stated his understanding that the Government would undertake to use its best efforts to have Johnson's two cases consolidated for sentencing. Letters to Judges Owen and Metzner were sent on September 21, 1976, seeking such consolidation * and the minutes of Johnson's plea before Judge Metzner reflect that the District Judges agreed that Judge Owen would sentence Johnson on both cases. At the time of the second plea, as Johnson testified, he finally agreed that he would testify in Simmons' case. As Johnson also testified, following a meeting on October 12, 1976, a written agreement embodying the terms of his cooperation was prepared and on October 13, 1976, that agreement was executed by Benny Johnson, Mr. Cohen and the Government.**

---

* A copy of that letter was turned over for use on cross-examination of Johnson.

** The executed agreement was offered into evidence on redirect not on the relatively unimportant issue of the date of the agreement, but to clarify the record as to the terms of the agreement which defense counsel had tried to portray during Johnson's cross-examination as a total immunization of Johnson in this case. Counsel's question to Johnson was as follows: "And that agreement was that if you testified against Grace Simmons they wouldn't prosecute you in connection with indictment number 75 Cr. 504, which is this indictment, is that correct?" (Tr. 51). This question was astounding in view of the fact that defense counsel knew that Johnson had pleaded guilty in this case.

To counter this misleading impression, it was proper to

[Footnote continued on following page]

This history shows that Johnson's testimony about the date of his agreement with the Government was in accord with the facts as he knew them and with the facts as Assistant United States Attorney Strauss knew them.* Johnson certainly could not be expected to believe that he had entered into a deal with the Government in May 1975 when his own attorney was left with the impression that no such arrangement existed. Mr. Engel's belief that he had reached an agreement with Mr. Cohen cannot be claimed to constitute proof that there was such an agreement in light of Mr. Cohen's continual disclaimers. Certainly, absent agreement on Mr. Cohen's side, the deal with the Government simply did not exist.

Despite the hoopla now made of this issue on appeal, trial counsel did not move to set aside the verdict on this ground or otherwise find a way of raising before the trial court the claim that Johnson's testimony on this issue was false and the falsity knowingly sanctioned by the Government. Moreover, defense counsel did not attempt to call witnesses to contradict Johnson's account of the events. Assistant United States Attorney Engel was certainly available on this issue, as was Johnson's attorney, who was in the courtroom during the trial, (Tr. 34), and could testify even absent a waiver of the privilege as to his dealings with the Government.** Trial

---

introduce the agreement into evidence. *United States* v. *Araujo*, 539 F.2d 287, 290 (2d Cir. 1976); *United States* v. *Aloi*, 511 F.2d 585, 597-98 (2d Cir.), *cert. denied*, 423 U.S. 1015 (1975); *United States* v. *Koss*, 506 F.2d 1103, 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

* This fact in itself distinguishes *Giglio* v. *United States*, 405 U.S. 150 (1972), on which appellant so heavily relises. In *Giglio* the jury was misled into believing that the Government's witness received no promises, when in fact he had. Here, Johnson's testimony was in no way false. Moreover, *Giglio* involved failure to reveal the existence of a promise. Here, all promises to Johnson were fully exposed.

** Contrary to the assertion in Simmons' brief that trial counsel had to "take" Johnson's answers on this issue, (Br. 19), he could have at least argued that the issue was not collateral and could be disproved by extrinsic evidence.

counsel's failure even to attempt to proffer such evidence can fairly be attributed to his own familiarity with the checkered history of Johnson's dealings with the Government,* as well as his apparent belief that the timing of Johnson's agreement with the Government would hardly decide this case for the jury.

POINT III

The Government Established the Chain of Custody of Each Narcotic Exhibit.

Simmons' last point is the utterly specious contention that the chain of custody of each of the three heroin exhibits admitted into evidence was insufficiently established. Even the recitation in Simmons' brief demonstrates that the chain of custody for each exhibit was fully adduced before the jury. As to the package of heroin constituting Government Exhibit 1, Simmons gave it to Brown, (Tr. 90-91), who gave it to Agent Grant, who in turn delivered it to the DEA lab. (Tr. 178, 181).**

---

* Trial counsel was present during one pre-trial conference where the Government sought and obtained a bench warrant for Johnson, (Tr. 9/25/75 at 31), and at another where Mr. Cohen sought to join in defense motions to dismiss the indictment. (Tr. 10/14/75 at 8). It was at the September 25th conference, with Simmons' attorney present, that Judge Metzner observed that Mr. Engel's belief that Johnson would plead guilty was contradicted by Mr. Cohen's assertion that he did not know that Johnson would do so. (Tr. 9/25/75 at 19).

** Simmons tries to make something of the fact that Agent Grant said "it was delivered to the lab." (Tr. 181; Br. 24). However, before testifying in that way Agent Grant answered affirmatively when he was asked: "Did you maintain custody of it and deliver it to the lab?" (Tr. 191).

Likewise Government Exhibit 2 was traced from Hicks to Brown (Tr. 97), who delivered the package to Agent Gordon (Tr. 158). (Tr. 183-84).* Finally, with respect to Government Exhibit 3, the package was delivered by Hicks to Agent Gordon, who maintained custody of it through delivery to the lab. (Tr. 160-62).

The requirement of a chain of custody is merely one form of authentication of evidence; an exhibit is authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a); *United States* v. *Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3608 (1976). See also *United States* v. *Montalvo*, 271 F.2d 922, 925 (2d Cir. 1959), *cert. denied*, 361 U.S. 961 (1960). Particularly since there was no evidence whatsoever or even the slightest irregularity, see *United States* v. *Chiasizio*, 525 F.2d 289, 295-96 (2d Cir. 1975), the chain of custody requirement was more than met in this case.

In any event, at trial Simmons never once objected to these exhibits on the ground that the chain of custody was inadequate. Appellate counsel attempts to meet this obvious problem by disingenuously including quotations from the transcript where trial counsel registered objections to the admission of these exhibits. The selected quotations fail to reveal that trial counsel only objected on ground that the exhibits were not "connected" to his

---

* Brown's recollection that he gave the package to Gordon at the West Side Highway rather than at the bar, as Agent Gordon testified, does not destroy the chain of custody, as Simmons' counsel appears to suggest.

client.* Trial counsel may well have made the sensible tactical choice to eschew technical objections in favor of a general posture that this evidence had nothing to do with his client. However, apart from the tactics of the situation, defense counsel did not object to the chain of custody that was established and any claim related to it was therefore waived for purposes of appeal. Under Fed. R. Evid. 103(a)(1), "[e]rror may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected and . . . a timely objection or motion to strike appears of record, stating the specific ground of objection. . . ." Here, there was no specific objection and, even if made, it would not have been well taken.

---

* Thus, as to Exhibit 2, the first package to be offered, counsel registered a general objection. The court ruled the exhibit would be received "subject to further connection." Defense counsel responded, "Very well, Your Honor." (Tr. 158). When Exhibit 3 was offered, defense counsel said, "the same objection." The court responded, "the same ruling." (Tr. 162). As to Exhibit 1, when defense counsel raised the "same objection," the Government responded that the connection had already been shown as to this exhibit (since the defendant had personally delivered it, and thus her relationship to her co-conspirators was irrelevant to its admissibility). The court agreed and the exhibit was received without further objection by defense counsel. (Tr. 182).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

AUDREY STRAUSS,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1976— 714-017-550

Form 280 A. -Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

AUDREY STRAUSS, being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the 23rd day of February, 1977 he served a copy of the within brief by placing the same in aproperly postpaid franked envelope addressed:

Aaron J. Jafee, Esq.
401 Broadway
New York, N. Y. 10013

And deponent further says that he sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York

Audrey Strauss
AUDREY STRAUSS

Sworn to me before this

23day of February, 1977

Mary L. Avent
MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977